RECENT CASES.

Negligence — Question of Law or of Fact. — In the recent case of *Farrell* v. *Waterbury Horse Railway Co.*, 60 Conn. 239, 21 Atlantic Rep. 675, the question of negligence as one of law or of fact has been thoroughly discussed and set for that great length. In the course of the decision the Court says: "There is involved, in the legal conception of negligence, the existence of a test or standard of conduct, with which the given conduct is to be compared, and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called the question of negligence. The result of comparing the conduct with the standard is generally spoken of as 'negligence,' or 'the finding of negligence.' Negligence, in this last sense, is always a conclusion or inference, and never a 'fact,' in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a question of law, and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes and defines beforehand the precise specific conduct required, under given circumstances, the standard by which such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. * * * In cases involving the question of negligence, where the general rule of conduct is alone applicable, where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion, based upon his experience, not only upon the question what did the parties do or omit, under the circumstances? but upon the further question, what would a prudent, reasonable man have done under those circumstances? and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question,— the inference or conclusion of negligence is one to be drawn by the trier, and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts

have been properly found, unless the court can see from the record that in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law."

Liquidated Damages — Penalty.— Condon v. *Kemper*, 27 Pacific Reporter 829. The much vexed question of liquidated damages and penalty has recently received an exhaustive treatment at the hands of the Supreme Court of Kansas in the above entitled case. Plaintiff and defendant entered into a written contract whereby Condon agreed to build a wall or else, at his election, to remove a certain house a short distance and put it in as good condition as it was before, and further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of $500 as *liquidated* and *ascertained damages* for the breach of this contract." Condon failed either to build the wall or move the house, but the cost of moving it and putting it in as good condition as before would not have exceeded $100. The question before the court was the following: Are the words of the parties to govern and the $500 to be considered as *liquidated damages*, or must they look further into the actual nature of the transaction with the primal idea of compensation in view? After an elaborate citation of cases and text-books the court held that when the parties made the contract and stipulated for damages in case of breach, by use of the words *liquidated* and *ascertained damages*, fixing the amount at $500, they could not have had in contemplation *actual damages*, and hence the sum mentioned in the contract must be treated as a *penalty* and not as liquidated damages. Said Valentine, J., in the course of the opinion, "the tendency and preference of the law is to regard a stated sum as a *penalty*, instead of *liquidated damages*, because *actual damages* can then be recovered, and the recovery be limited to such damages." And quoting from 1 Sedgwick on Damages (8th Ed.) he says further, "whenever the damages were evidently the subject for calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as *liquidated damages*." And again from the same work, "where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will *not* be